

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-1336

B
pgs.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

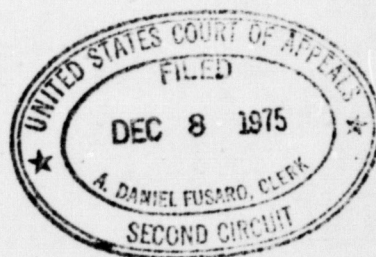
RICHARD SIMONS,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

BRADLEY B. DAVIS
Attorney for Defendant-Appellant
1235 Park Avenue
New York City 10028

212-876-1609



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1336

UNITED STATES OF AMERICA,

Appellee,

-v-

RICHARD SIMONS,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

POINT ONE: GIVEN THE CIRCUMSTANCES AT THE PROBATION VIOLATION HEARING, THERE WAS NO KNOWLING AND INTELLIGENT ADMISSION OF VIOLATION

A. The Judge at the Probation Violation Hearing Failed to Make Adequate Investigation of Appellant's Mental State

In the first point of its brief, appellee argues that at the probation violation hearing, the judge presiding properly accepted appellant's admission of violation after sufficient investigation into the mental state of the appellant at the time.

Appellee does not contest the right of appellant to raise the question of his mental competence at the time of revocation of probation through this 28 U.S.C. 2255 proceeding¹, which indeed is the holding in the very first case (Miranda, p. 4) cited in appellee's brief. However, appellee states that this did not have to be considered by the court below in this 2255 proceeding because there was nothing more than a "bald allegation of mental incompetence".

1. Appellee does, however, claim that this issue was not raised below "except in the most oblique fashion". However, point (c) of the petition (A-11) states, "I have, in effect been sentenced to jail for mental illness," and this also is discussed at length later in the petition (A-12). That this was not considered by Judge Frankel is another reason for reversal.

In support of its position on this point, defendants cite Falu and Lopez (p.5)¹, in neither of which there was any proof of mental incompetency whatsoever beyond its bald allegation, and, most surprisingly, Miranda (p.4) where the appellate court required a hearing as to mental competency even though the court below "went to great pains to investigate Miranda's sanity."²

Unlike Lopez and Falu, the case at bar is replete with grounds warranting a hearing as to mental competence. Appellant was sent to Odyssey House which is a psychiatric rehabilitation institute after a three-month examination period in Lewisburg which found severe mental illness. (A-9). Whatever happened at Odyssey House on the date appellant reported there remains unknown, but whatever it was it sufficed for the Odyssey staff to send appellant to the psychiatric ward of Bellevue Hospital where he remained until the revocation hearing and where he was found severely mentally ill. The Court at the revocation hearing was fully aware of this (A-20). To say the least, this is not a situation with "bald allegations" of incompetence, and therefore a hearing as to mental competence at the time of revocation is mandated.

B. The Judge at the Probation Violation Hearing Failed To Make Adequate Investigation of Appellant's Drugged State

Apart from the serious question of appellant's psychiatric state at the time of revocation hearing, there is the crucial point of his having been drugged at the time. There is no question but

that the Court knew that appellant was under sedation (A-22)

1. The cases concerning appellant's drugged state at the time are discussed below.

2. Appellant apologizes for improperly citing the reversal of the Otis case as is pointed out on the footnote to p.9 of appellee's brief. This was inadvertently caused by the change of name of the case between the District and Circuit Courts. However, the reversal was not on the point of law for which the case was cited, but rather on the factual question of whether or not that particular party was competent.

However, it made no effort to determine whether or not appellant was thereby rendered incompetent except by inquiring of appellant himself (A-23). Obviously, one does not determine the competency of a person by asking him if he is competent: an incompetent person would, by definition, be incapable of competently answering such a question. However, this is precisely what was done at the revocation hearing.

Appellant cites Sasser (p.4) in support of its contention that the drugging of appellant was not sufficient ground for a competency hearing. However, the language in Sasser is, on the whole, extremely favorable to appellant. In that case, the Court held that in a 2255 petition, one can raise the question of incompetency due to drugging at the time of plea. It also held that if such a question is raised, the petitioner is entitled to a hearing unless the "files and records conclusively show prisoner is entitled to no relief." In the Sasser case, relief was denied because while petitioner claimed he was under the influence of librium, he could offer absolutely no explanation as to how he could have obtained this tranquilizer. This distinguished the case from Lopez v. U.S., 439 F.2d 997 (1971) where the petitioner was given a hearing because he explained that he had been tranquilized in a ward. As in Lopez, not only do we know that petitioner was tranquilized, we know that he was sedated at the Bellevue Hospital psychiatric ward because "they found it necessary to sedate him" (A-22). Thus, under both Lopez and Sasser doctrines, petitioner is entitled to a hearing as to whether this drugging rendered him incompetent at the time of the probation revocation hearing.

POINT TWO: THE COURT BELOW FAILED TO ADHERE TO DUE
PROCESS REQUIREMENTS AT THE PROBATION REVOCATION HEARING

There is no longer any question but that due process requirements apply to probation revocation hearings:

Petitioner does not contend that there is any difference relative to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one. Probation revocation, like parole revocation, is not a stage of a criminal process, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey v. Brewer....
Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1956 (1973)

See also U.S. ex rel Burgess v. Lindsey, 395 F. Supp. 404 (E.D.Pa.1975)

Among the relevant Morrissey standards not adhered to below are:

- (a) written notice of claimed violations of parole;
- (b) disclosure to parolee of evidence against him; ...
- (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole. (at 489)
Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1952)

See also Jackson v. Wise, 390 F. Supp. 19 (C.D.Cal. 1975)

None of the above were adhered to by the Court below at the time of the alleged probation violation: there was no preliminary hearing (unless A-19 through A-37 be considered such, in which case there was no final hearing); there is no evidence that appellant was given any written notice of claimed violations; nowhere in the record is there any disclosure to appellant of evidence against him; nor does the record show any finding as to the evidence relied upon for revoking parole.

The cases cited by appellee on this point are inapposite. Francishine (p.6) holds that an underlying conviction cannot be challenged in a probation revocation hearing. Jianole (p.6) is a 1932 case, decided not only before the legal status of probation violation hearings had been established, but under a prior statute.

Therefore, apart from the fact that appellant was both mentally incompetent and drugged at the probation violation hearing, that hearing did not begin to adhere to the Morrissey standards which Gagnon has applied to probation violation hearings, and therefore appellant was denied due process of law.

POINT THREE: NO VIOLATION OF PROBATION SUFFICIENT TO SUPPORT REVOCATION AND IMPRISONMENT WAS ESTABLISHED

Beyond all this, there is absolutely nothing in the record to establish that appellant violated probation in any willful or other manner that warranted imprisonment.

The Court below was at all times aware that appellant was suffering from serious mental illness. At the time of original sentence, it sent appellant for a lengthy psychiatric evaluation at Lewisburg out of such recognition. Based upon the Lewisburg report that the appellant was indeed severely mentally ill, it sent appellant to Odyssey House, a psychiatrically-oriented drug rehabilitation¹ center. Precisely what happened at Odyssey House is nowhere in the record, but whatever it was it led Odyssey officials to conclude that appellant was too mentally ill for their program, and so they sent appellant to Bellevue Hospital psychiatric ward where he remained until the revocation hearing.

Thus, the only "wrong" committed by appellant was his being too ill for the Odyssey program. If a person, as a condition of probation, is sent to a tuberculosis treatment center, and it is later discovered that he has pneumonia, a change in probation conditions would be warranted, but certainly not imprisonment for probation violation. The case at bar is directly analogous: in setting probation conditions (A-9), the Court below either underestimated appellant's mental illness or overestimated Odyssey House's psychiatric capabilities. This warrants

1. Appellant was admittedly at one time addicted to amphetamines, although he could not have been at the time of the probationary sentence (A-9) as he had been imprisoned for three months already.

a change in probation conditions but not imprisonment:

There is no rational connection between the non-criminal conduct of which the Parole Commission convicted Howie and a prison sentence of five and three-quarter years. Changing jobs, drinking alcohol, failing to please the probation officer and 'living with' a woman not his wife are not shown to be criminal acts.

Howie v. Byrd, 396 F. Supp. 117 (W.D.N.Carolina 1975)

The cases cited by appellee on page 7 of its brief involve an entirely different nature of acts. For example, Markovich concerns an arrest for theft; Garza involves conviction for a criminal offense. Strada involves 19 tax fraud violations. Nagelberg involves a willful violation of travel restrictions. Carfora involves a willful failure to make restitution to the defrauded airline, which fraud was the basis of the original conviction. The dissent in Carfora pointed out that if the failure had not been willful, there would be no violation. This is the same position as the Second Circuit took in Wilson where it failed to uphold a revocation brought about by impercunity, even though in that instance the lower court found willfulness.

In all of the cases where revocation was upheld, the alleged violation was undisputedly willful, and in almost all instances criminal. Where the act was brought about by non-willful, non-criminal acts, such as in Wilson, revocation was not in order. In the case at bar, even had all due process standards been adhered to and a proper hearing held, the worst finding the Court could have made was that appellant was too mentally ill for the Odyssey House program. Neither in any of the cases above nor simple common sense is that a rational basis for imprisonment.

POINT FOUR: THE SENTENCE AT THE PROBATION VIOLATION HEARING WAS IMPROPER IN THAT IT EXCEEDED THAT IMPOSED INITIALLY

The initial sentence imposed at the time of guilty plea was five years (A-8). Thereafter, appellant was placed on probation(A-9).

At the revocation hearing, appellant was given a sentence of four years' imprisonment plus three years' parole. This exceeded the original sentence and therefore, apart from all the other reasons set forth, must be reversed:

Thereupon, the court may revoke the probation and require him to serve the sentence imposed or any lesser sentence, or if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.
18 U.S.C. 3653

In Nagelberg, cited on page 7 of appellee's brief, the Second Circuit discussed the history of this statute and why a greater sentence cannot be imposed upon violation of probation than upon the original sentence. This was likewise discussed by the Seventh Circuit in the Braun case cited on that same page, as well as in Howie v. Byrd, supra.

A sentence of four years in prison plus three years' parole is effectively a seven-year sentence, thus exceeding the initial sentence of five years. Therefore, even had a violation been established warranting probation revocation after a proper hearing in accordance with Gagnon and Morrissey both as to appellant's mental capacity and as to the violation (none of which in fact occurred) the sentence imposed still would be illegal and unconstitutional.

POINT FIVE: THE COURT BELOW IMPROPERLY FAILED TO
RECONSIDER ITS 18 U.S.C. 4208(a)(2) SENTENCE

Appellee does not dispute that U.S. v. Slutsky, cited on p.10 of its brief, requires reconsideration of an (a)(2) sentence where the trial judge was not aware of parole board standards, nor indeed did it dispute appellant's right to such review below. However, it takes the position that (1) Judge Frankel had been aware of these imperfections at the time of sentence and (2) that Judge Frankel did in fact review the sentence.

It is true that Judge Frankel states in the opinion appealed from that he was aware of the "imperfect procedures attending 18 U.S.C.4208(a)(2)." (A-7). However, the transcript of the probation violation hearing completely belies this assertion.

"Now I can sentence you under a judgment that will allow the Board of Parole in consultation with the people at Springfield to order your release whenever they think you are ready" (A-26 to A-27)

See also A-29. This is precisely what is supposed to happen under an (a)(2) sentence but what in fact does not happen, and why Slutsky requires reconsideration. If the trial court was aware that Parole Boards in fact do not adhere to (a)(2) standards at the time of violation sentence, it certainly did not indicate this to appellant, and in fact spoke completely opposite to that awareness.

Nor can the short paragraph at the end of the opinion be considered a reconsideration of sentence (A-7). To reconsider the sentence, the Court would have to have many reports from Court agencies, psychiatrists and the like before it, and also would have to have the defendant before it. No such information was before the court if only because the petition requested reconsideration, and it was the expectation of all parties that if the request was granted, a time and place would be set at which reconsideration would be made.

Moreover, the reasoning given upon the alleged reconsideration, to wit that there should be no revision in sentence because appellant might be paroled within the next few months, not only is no ground for denying reconsideration but shows that the Court below still was unaware of Parole Board procedures following (a)(2) sentences. It is

now more than half a year since the petition was filed, and more than four months since the decision of the Court below, and appellant still is in prison . Moreover, the fact that appellant may have served the greater part of (a)(2) sentence before a 2255 petition is brought is no reason to deny review of that sentence. As the Gates case cited in appellant's earlier brief makes clear, a 2255 petition may be brought even after a sentence has been fully served.

CONCLUSION

Appellant has already spent over a year and a half in prison for being more severely mentally ill than the Odyssey House staff was capable of treating. He is in jail for no other reason. The only other reason for sending him to Odyssey House in the first instance, his drug addiction, has long been cured by the sheer fact of his lengthy imprisonment which began in January of 1974. Appellant was clearly both mentally incompetent and drugged at the time of the revocation hearing, although the trial court did not make any adequate investigation into either of these conditions. He was denied many of the rights assured to him by Gagnon. Moreover, even had he been given these rights and had a proper hearing been held, the most that could have been established was his severe mental illness, certainly no ground for imprisonment. Moreover, his probationary violation sentence exceeded the original sentence in violation of 18 U.S.C. 3653, and his (a)(2) sentence was made by a trial judge who clearly did not have awareness of parole board procedures thereunder.

Therefore, for all of the above reasons, the 2255 petition must be granted and the finding of probation violation set aside. It is further submitted that the time appellant has spent in prison (at present some 23 months) should be considered the equivalent of

three years' probation, and so this court should find that appellant has served the equivalent of his sentence. In any event, as it is obvious that even if a new hearing is held at which all mandated procedures are adhered to, the most that can be found is severe mental illness, there is no reason for the time and expense of any such procedure to be undertaken. Rather, this Court should assume that such a finding would be the most that court be made at such a hearing, and if for any reason it does not find two years' imprisonment as at least the equivalent of three years' probation, should reinstate the probation order of May 13, 1974 (A-9), crediting time served against the period of probation, and make a condition of probation that appellant undertake psychiatric treatment for the remainder of the probationary period.

Thus, for the reasons set forth herein as well as in the earlier brief, the order of the District Court should be reversed.

BRADLEY B. DAVIS
Attorney for Appellant